PUBLIC FINANCE BHD.

v.

PENKIN CREDIT & LEASING SDN. BHD. & ORS.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 22/266-89]
12 DECEMBER 1991

CIVIL PROCEDURE: *Summary judgment - Statement of defence - Affidavit in reply did not condescend upon particulars and did not deal specifically with plaintiffs claim - Whether in point - Counterclaim - Conditional leave to defend.*

On 30 August 1989, the plaintiffs took out a SIC for summary judgment against the defendants. On 19 January 1990 the defendants filed their defence. On 25 January the second defendant filed an affidavit in answer to the plaintiff's application for summary judgment. The said affidavit merely listed the defences without condescending to particulars. Instead it adopted "the facts as set out in the statement of defence and counter-claim as part of" the affidavit.

The application for summary judgment was dismissed by the SAR. The plaintiffs appealed to the Court. The Court allowed the appeal but granted the defendants conditional leave to defend. The defendants were ordered to pay the principal sum claimed into Court within two months.

The matter before the Court was that the defendants' affidavit in reply did not condescend upon particulars, did not deal specifically with the plaintiffs' claim, did not state clearly and concisely what the defence was or what facts were relied upon to support it.

Held:

[1] By para. 19 of the statement of defence, the defendants alleged that the guarantee was invalid, null and void because it was fraudulent, unconscionably signed under undue influence and misrepresentations contrary to s. 18 of the Contracts Act 1950. However, no particulars were given. It is trite law that where allegations of fraud, undue influence and misrepresentation are made, particulars must be given.

[2] It was also argued that unconditional leave to defend should be given because the defendants had raised a counter-claim against the plaintiffs. There is no doubt that that is a correct statement of the law.

[Appeal allowed but leave to defend the action given to the defendants on condition that they pay into Court the principle sum within two months.]

Cases referred to:
Tractors Malaysia Berhad v. Joseph Thambirajah & Anor. [1986] CLJ (Rep) 752 ***(cons)***
Huo Heng Oil Co. (EM) Sdn. Bhd v. Tan Tiew Yong [1987] 1 MLJ 139 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 18

Other sources referred to:
Supreme Court Practice [1988] Vol. I 140, para. 14/2-4/4
Mallal's Supreme Court Practice, Second Edn., Vol. I 96 & 97

For the plaintiff - Cynthia Lee Bee Gaik; M/s. Gan Teik Chee & Ho
For the defendant - Darshan Singh; M/s. Darshan Singh & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

The plaintiffs claimed against the defendants for the sum of RM226,560.05, interests and costs arising from two master agreements both dated 16 June 1983. By the said agreements, the plaintiffs granted hire purchase block discounting facilities (Account No. 2) and lease agreement block discounting facilities (Account No. 3) to the first defendants. The 2nd, 3rd, 4th and 5th defendants were guarantors of the 1st defendants. The 1st defendants defaulted in their monthly block instalment payments to the plaintiffs. By March 1987, the 1st defendants were owing the sum of RM190,506.30 to the plaintiffs. Negotiations ensued and the plaintiffs and the 1st defendants agreed that the 1st defendants pay RM8,000 per month. In accordance with the last mentioned agreement the 1st defendants paid 16 instalments of RM8,000 per month and a further sum of RM2,021. No payments were made subsequently. Hence this suit.

On 30 August 1989, the plaintiffs took out a summons-in-chambers for summary judgment against the defendants.

On 19 January 1990 the defendants filed their defence.

On 25 January 1990, the 2nd defendants, on behalf of all the defendants filed an affidavit in answer to the plaintiffs' application for summary judgment. Compared to the statement of defence which is 14 pages in length, this affidavit is very brief. Indeed it merely listed the defences without condescending to particulars. Instead it adopted "the facts as set out in the statement of defence and counter-claim as part of" the affidavit.

The application for summary judgment was dismissed by the Senior Assistant Registrar. The plaintiffs appealed to me. I allowed the appeal but granted the defendants **conditional** leave to defend. The defendants were ordered to pay the principal sum claimed into Court within two months.

The plaintiffs' case was straight-forward: The 1st defendants entered into the said agreements with the plaintiffs, defaulted in making payments, admitted the amount due, agreed to pay the monthly instalments, paid for a period of time and defaulted again. The other defendants were the guarantors.

The main defence put up by the defendants was that the agreements were illegal and in breach of various laws. The defendant, in their statement of defence, listed eleven Acts of Parliament which the plaintiffs were alleged to have breached.

Learned Counsel argued that the defendants' affidavit in reply did not condescend upon particulars, did not deal specifically with the plaintiffs' claim, did not state clearly and concisely what the defence was or what facts were relied upon to support it.

He referred to the 1988 edition of the *Supreme Court Practice* Vol. I at p. 140 para. 14/2-4/4 which states as follows:

> Defendant's affidavit - the defendant's affidavit must "condescend upon particulars" and should as far as possible deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied upon to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.

He also quoted the following passage:

> Similarly, if a legal objection is raised, the facts and the point of law arising thereon must be clearly stated.

It is quite true that the affidavit failed to do the same. It merely listed the defences and adopted the facts stated in the statement of defence and counter-claim as part of the affidavit. I do not think this is a proper way to do it. However as the defence and counter-claim were filed, subsequent to the application for summary judgment but prior to the filing of the affidavit in question, I referred to it. However, reading the statement of defence it is not clear what the breaches are.

The other issue is whether the master agreements had been re-instated. A perusal of Exhibits CSH7, CSH13 show clearly that the master agreements were re-instated. Furthermore Exhibit CSH14 show that the 1st defendants did collect payments after the master agreements were re-instated. This also answers the defendants' contention that the plaintiffs should sue the individual hirers and not the defendants.

By para. 19 of the statement of defence, the defendants alleged that the guarantee was invalid, null and void, because it was fraudulent, unconscionably signed under undue influence and misrepresentations contrary to s. 18 of the Contracts Act 1950. However, no particulars were given. It is trite law that where allegations of fraud, undue influence and misrepresentation are made, particulars must be given - See: *Tractors Malaysia Bhd. v. Joseph Thambirajah & Anor.* [1986] CLJ (Rep) 752.

I considered the defence. I was of the view that this was a proper case where conditional leave to defend should be given.

As regards the principles when such an order should be made, I need only refer to *Mallal's Supreme Court Practice,* Second Edn., Vol. I at pp. 96 and 97:

> Conditional leave to defend: Leave to defend conditional upon the defendant paying the sum claimed into Court or giving security therefor where there is good ground in the evidence for believing that the defence set up is a sham and the Registrar is prepared very nearly to give judgment for the plaintiff: *Wing v. Thurlow* [1893] 10 TLR 53; *Fieldrank Ltd. v. E. Stein* [1961] 1 WLR 1787; [1961] 3 All ER 681; or where the defence is "shadowy": *Van Lynn Developments Ltd. v. Pelias Construction Co.* [1969] 1 QB 607; [1968] 3 All ER 824; or where there is little or no substance in it: *Ionian Bank Ltd. v. Couvreur* [1969] 1 WLR 781; [1969] 2 All ER 651 CA.
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> In *Alliance (Malaya) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd.* [1974] 2 MLJ 94, the Federal Court thought the principal's defence to their sub-contractors' claim for work done was a sham defence with very little substance in it and that the Court should have given leave to defend only upon their paying into Court the amount of the claim.
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> But this is a matter for the discretion of the Court: *Chan Cheong Theng v. Chan Phooi Hoong* [1941] MLJ 177.
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> Where there is doubt as to the *bona fides* of the defence, leave to defend should be conditional: *Foong Weng Tat v. Vu Siew Chin* [1974] 2 MLJ 20 FC: *Ted Bates (M) Sdn. Bhd. v. Balbir Singh Jholl* [1979] 2 MLJ 257 FC.

I was of the view that there was good ground for believing that the defence set up is a sham or at least "shadowy".

Learned Counsel for the defendants also argued that unconditional leave to defend should be given because the defendants had raised a counter claim against the plaintiffs. He referred to the case of *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v. Tan Tiew Yong* [1987] 1 MLJ 139, in particular, to a passage at p. 143:

> unconditional leave to defend should be given where the defendant has no defence to the plaintiff's claim but raises a *bona fide* counterclaim which is in the nature of a defence to the claim.

There is no doubt that that is a correct statement of the law. However, one should look at the counterclaim in the present case. Prayers (a), (b) and (c) of the counterclaim are for the declaration that that agreements are null and void. This in fact was one of the defences put up. The rest of the prayers are for the supply of copies of the agreements, notices, statement of account and so on, most of which, at least, were produced by the plaintiffs in their affidavits. I do not think the counter claims are in the nature of a defence to the claim, neither can they be said to be *bona fide*, for the above-stated principle to apply.

On these grounds I allowed the appeal but gave leave to the defendants to defend the action on condition that the defendants pay into Court the principle sum within two months.

Also found at [1992] 1 CLJ 704